

A **Haridas a/l Subramaniam & Anor v Public Prosecutor**

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
J-05-237 OF 2009
ABDUL MALIK ISHAK, SULONG MATJERAIE AND AZHAR MA'AH
JJCA
17 NOVEMBER 2011

C *Criminal Procedure — Sentence — Appeal against sentence — Culpable homicide*
not amounting to murder — Twenty years imprisonment — Deterrent sentence —
Whether offence committed by appellants serious and required exemplary
punishment — Whether sentence passed in accordance with established judicial
D *principles — Whether there were extenuating circumstances — Whether sentence*
should reflect gravity of offence

E The appellants were jointly charged with the murder of Jumary bin Selamat
(‘the deceased’). The prosecution adduced evidence of how the appellants had
approached the deceased, a petrol station attendant, and mercilessly assaulted
him at the petrol station before dragging him inside the motorcar they were
travelling in. Upon reaching an oil palm estate (‘the estate’) both the appellants
and the deceased had alighted from the motorcar. The deceased had then
struggled to free himself from his captives, the two appellants, and run towards
F the direction of the estate but both the appellants had given chase and entered
inside the estate. Approximately half an hour later, both the appellants had
returned to the motorcar with their clothes soiled in blood without the
deceased. Twelve days later the police discovered a decomposed body beyond
recognition in the estate. The DNA test carried out by the government chemist
G confirmed that the decomposed body was that of the deceased. According to
the post mortem report, the cause of death was listed as multiple incised
wounds. At the close of the prosecution’s case, the trial judge found that the
prosecution had failed to establish a prima facie case of murder against both the
appellants. However, the trial judge was satisfied that the prosecution had
H succeeded in establishing a prima facie case for an offence of culpable homicide
not amounting to murder, which was punishable under s 304(a) of the Penal
Code read together with s 34 of the same Code. Both the appellants pleaded
guilty to the amended charge and were convicted to 20 years imprisonment.
This was the appellants’ appeal against that sentence.

I **Held**, dismissing the appeals:

- (1) The trial judge had rightly considered the gravity of the offence, the facts that led to its commission, and the sentences imposed in the past for similar offences to determine the sentence to be passed in the present

case. The offence committed by the appellants was serious and it required an exemplary punishment. Without a motive the appellants had mercilessly attacked the deceased, seriously injured him in the estate and left him to die without immediate medical care. The trial judge appreciated the evidence before he sentenced both the appellants (see paras 12–15).

- (2) This court was of the view that pleading guilty to the amended charge at first opportunity should not entitle the appellants to any discount. This was the worst case imaginable and this court wished to make it clear that crime did not pay. The only way for the court to send this message across was by imposing a severe deterrent sentence (see paras 17–18).
- (3) After taking into account the mitigation of each appellant and factors such as the nature of the offence, the prevalence of the offence, the difficulty of detection and the sordid circumstances in which the offence was committed, this court agreed with the sentence imposed by the trial judge in this case. The court was satisfied that there were no extenuating circumstances to be considered in favour of both the appellants. Further, it was in the public interest that the sentence should reflect the gravity of the offence (see paras 21–25).

[Bahasa Malaysia summary]

Perayu-perayu adalah didakwa bersama dengan pembunuhan Jumary bin Selamat ('si mati'). Pihak pendakwaan mengemukakan keterangan bagaimana perayu-perayu mendekati si mati, atendan stesen petrol, dan dengan kejam menyerang mangsa di stesen petrol sebelum mengheret dia masuk kereta yang dinaiki mereka. Selepas sampai di estet kelapa sawit ('estet') kedua-dua perayu dan si mati telah turun daripada kereta. Si mati kemudiannya bergelut untuk membebaskan dirinya daripada tawanannya, kedua-dua perayu, dan berlari ke arah estet tetapi kedua-dua perayu mengejar dan memasuki estet tersebut. Lebih kurang setengah jam kemudian, kedua-dua perayu kembali ke kereta dengan baju mereka berlumuran darah dan tanpa si mati. Dua belas hari kemudian polis menemui badan reput yang tidak dapat dikenali di estet tersebut. Ujian DNA yang dijalankan oleh ahli kimia kerajaan mengesahkan bahawa badan reput tersebut adalah si mati. Mengikut laporan post mortem, sebab kematian dinyatakan sebagai *multiple incised wounds*. Di akhir kes pihak pendakwaan, hakim perbicaraan mendapati bahawa pihak pendakwaan gagal untuk membuktikan kes prima facie pembunuhan terhadap kedua-dua perayu. Walau bagaimanapun, hakim perbicaraan berpuas hati bahawa pihak pendakwaan berjaya dalam membuktikan kes prima facie untuk kesalahan homisid salah yang tidak menjumlahkan kepada pembunuhan, yang boleh dihukum di bawah s 304(a) Kanun Keseksan dibaca bersama dengan s 34 Kanun yang sama. Kedua-dua perayu mengaku bersalah kepada tuduhan

- A pindaan dan disabitkan kepada 20 tahun penjara. Ini adalah rayuan perayu-perayu terhadap hukuman tersebut.

Diputuskan, menolak rayuan-rayuan:

- B (1) Hakim perbicaraan telah secara betul mempertimbangkan graviti kesalahan itu, fakta yang membawa kepada perlakuannya, dan hukuman-hukuman yang dikenakan pada masa lalu untuk kesalahan yang sama untuk menentukan hukuman untuk dikenakan di dalam kes ini. Kesalahan yang dilakukan oleh perayu adalah serius dan ia memerlukan hukuman mencegah. Tanpa motif perayu-perayu secara kejam menyerang si mati, secara serius mencederakan dia di estet dan meninggalkannya untuk mati tanpa rawatan perubatan dengan segera. Kesalahan yang dilakukan oleh perayu adalah serius dan ia memerlukan hukuman mencegah. Tanpa motif perayu-perayu secara kejam menyerang si mati, secara serius mencederakan dia di estet dan meninggalkannya untuk mati tanpa rawatan perubatan dengan segera. Hakim perbicaraan menilai keterangan sebelum beliau menghukum kedua-dua perayu (lihat perenggan 12–15).
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- D (2) Mahkamah ini berpendapat bahawa pliding bersalah kepada tuduhan pindaan pada peluang pertama tidak memberikan hak kepada perayu terhadap apa-apa diskaun. Ini adalah kes yang teruk yang tidak dapat dibayangkan dan mahkamah ini ingin menjelaskan bahawa jenayah tersebut tidak setimpal. Satu-satunya cara untuk mahkamah ini menyampaikan mesej ini adalah dengan mengenakan hukuman berat (lihat perenggan 17–18).
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- (3) Selepas mengambil kira mitigasi setiap perayu dan faktor seperti sifat kesalahan, kelaziman kesalahan tersebut, kesukaran pengesanan dan keadaan buruk dalam mana kesalahan dilakukan, mahkamah ini bersetuju dengan hukuman yang dikenakan oleh hakim perbicaraan dalam kes ini. Mahkamah ini berpuas hati bahawa tidak terdapat keadaan untuk meringankan untuk dipertimbangkan bagi kedua-dua perayu. Selanjutnya, ia adalah kepentingan awam bahawa hukuman patut mencerminkan graviti kesalahan (lihat perenggan 21–25).]
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Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3553–3615.

H Cases referred to

- Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Kesavan all Baskaran v PP [2008] 6 MLJ 384; [2008] 6 CLJ 390, CA (refd)
I *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
PP v Ismail bin Loyok [1958] MLJ 223 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Loo Chang Hock [1988] 1 MLJ 316 (refd)
PP v Md Rashid bin Harun [2000] 3 MLJ 503; [2000] 3 CLJ 832, HC (refd)

PP v Soh Soo Yang & Anor [2001] 5 MLJ 356, HC (refd)

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PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)

Yau Kong Kui v PP [1989] 2 MLJ 139, HC (refd)

Yit Kean Hong v PP [2005] 4 CLJ 592, CA (refd)

Legislation referred to

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Criminal Procedure Code s 180(1)

Penal Code ss 34, 302, 304(a)

Appeal from: Criminal Trial No 45–3 of 2006 (High Court, Muar).

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Both the appellants are unrepresented.

Andi Razalijaya bin A Dadi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/public prosecutor.

Abdul Malik Ishak JCA (delivering judgment of the court):

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INTRODUCTION

[1] Both the appellants were jointly charged for the murder of Jumary bin Selamat (NRIC number 560520–71–5233), an offence punishable under s 302 of the Penal Code read together with s 34 of the same Code. They both claimed trial. The trial proceeded before the High Court at Muar.

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[2] The prosecution called twelve witnesses. At the close of the prosecution's case after evaluating the evidence on a maximum evaluation basis in accordance with s 180(1) of the Criminal Procedure Code and in compliance with *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 (CA); and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC), the learned High Court judge found that the prosecution failed to establish a prima facie case of murder against both the appellants. But his Lordship was satisfied that based on the evidence as adduced by the prosecution, the prosecution succeeded in establishing a prima facie case for an offence of culpable homicide not amounting to murder, punishable under s 304(a) of the Penal Code read together with s 34 of the same Code. His Lordship amended the charge against both the appellants and that amended charge reads as follows:

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Bahawa kamu pada 23.12.2003 antara pukul 1.30 pagi dan 7.45 pagi di Ladang Kelapa Sawit Tun Dr. Ismail, Simpang Renggam, di dalam Daerah Kluang, dalam Negeri Johor, dengan niat bersama telah melakukan satu homisid salah yang tidak terjumlah dalam kesalahan membunuh, dengan menyebabkan kematian Jumary bin Selamat (K/P No: 560520-71-5233) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaaan dan dibaca bersama seksyen 34 Kanun yang sama.

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- A** [3] Based on this amended charge, the learned High Court judge called the defence of both the appellants. Now, after the amended charge was read, explained and understood by each of the appellants, each one of them pleaded guilty to the amended charge and understood the nature and consequences of their pleas. They were assisted by their respective counsel. The learned High
- B** Court judge accepted their pleading guilty to the amended charge and convicted both the appellants accordingly.

- C** [4] After assessing the facts of the case and after taking into account the mitigation of each of the appellants, the learned High Court judge sentenced each of the appellants to twenty years imprisonment with effect from 21 January 2004. Aggrieved, both the appellants now appealed against the sentences imposed on them.

THE FACTS OF THE CASE

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- E** [5] On 23 December 2003 at about 1am, Saravanan a/l Paniselvam ('PW11') drove a Proton Aeroback motorcar from Johor Bahru to go to Kluang in order to collect some monies. Travelling together with him in the said motorcar were both the appellants and Thenmoli a/p Argellan ('PW12') accompanied by two young children. On arrival at Simpang Renggam at about 3am, the said motorcar entered into a Mobil petrol station and PW11 stopped the said motorcar there.

- F** [6] Both the appellants alighted from the said motorcar and they were seen approaching the petrol station attendant by the name of Jumary bin Selamat (deceased) who was at that time fast asleep on a reclining stool. Without furtherado, both the appellants mercilessly assaulted the deceased and then dragged him inside the said motorcar. On the instruction of the second
- G** appellant (Rajsegaran a/l Satbrumari), PW11 continued to drive the said motorcar until it reached an area of an oil palm estate. On arrival at the scene of the crime and that would be at Ladang Kelapa Sawit Tun Dr Ismail, Simpang Renggam, PW11 was directed to stop the said motorcar at one of the entrances to the said estate as reflected in the photograph marked as exh P4(1). But the
- H** said motorcar could not enter the said estate because there were barriers placed across the entrance to the said estate.

- I** [7] Everyone including the deceased got down from the said motorcar. After the deceased had alighted from the said motorcar, the second appellant held onto the deceased's shirt and the deceased struggled and succeeded to free himself and he then ran towards the direction of the said estate. Both the appellants gave chase and entered inside the compound of the said estate.

- [8] Approximately half an hour later, both the appellants returned to the said

motorcar with their clothes soiled in blood without the deceased. When PW11 asked about the whereabouts of the deceased, the second appellant replied that the deceased had been tied up in the said estate. All of them then returned to Johor Bahru. PW11 was paid RM50 by the second appellant.

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[9] On 3 January 2004 — some twelve days later, an Indonesian worker of the said estate alerted lance corporal Kalaiselvan a/l Machavelu, a police reserve, about the discovery of a decomposed body in the said estate. The decomposed body was in a sorry state of affairs as reflected in the photographs marked as exh P4 (2, 4, 5, 6 and 7). The decomposed body was naked and the trousers were used to tie both legs while the belt was used to tie both hands. The decomposed body was beyond recognition.

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[10] The government chemist who headed the DNA forensic unit in Johor Bahru by the name of Baktiar bin Kassim (PW10) gave evidence and his DNA report confirmed that the decomposed body was that of Jumary bin Selamat.

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[11] Dr Muhamad Azaini bin Ibrahim (PW9) who conducted the post mortem on the deceased testified that there were five incised wounds on the body of the deceased and the cause of death was listed as ‘multiple incised wounds’. According to the good doctor, all the five incised wounds if taken cumulatively and over a period of time without treatment would cause death. The doctor surmised and was of the opinion that death could possibly occur 5 to 6 hours after the incised wounds were inflicted. The doctor was also of the view that the deceased had died between five to ten days before his decomposed body was found.

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ANALYSIS

[12] In assessing the length of the custodial sentence, the learned High Court judge rightly considered the gravity of the offence committed by both the appellants, the facts that led to the commission of the offence, the presence or absence of any mitigating circumstances, and the sentences that have been imposed by other courts in the past for similar offences in order to determine and gauge the trend of sentencing policy.

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[13] It cannot be denied that the offence committed by the appellants is serious and it requires an exemplary punishment. For no rhyme or reason, both the appellants mercilessly attacked the deceased when the latter was still asleep and dragged him into the said motorcar. And when the deceased fled towards the estate, both the appellants gave chase and inflicted five fatal incised wounds on the deceased. It was a senseless killing and the learned High Court judge was right when he said that the offence cannot be forgiven.

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A [14] There was no motive for killing the deceased. Nothing was stolen from the petrol station. It seems to us that both the appellants enjoy killing the deceased. The deceased had no chance to survive. He was left alone, seriously injured in pitch darkness in the said estate to die without immediate medical care. And his decomposed body was left to rot between five to ten days before it was found. He must have suffered and died in excruciating pain. The learned High Court judge lamented that there was no necessity for the deceased to die. We cannot disagree with him on this point.

C [15] The learned High Court judge appreciated the evidence before he sentenced both the appellants. This was what His Lordship said (see pp 11– 12 of the appeal record):

D Si mati sebenarnya tidak perlu mati. Ini kerana motif OKT dan rakannya itu bukanlah hendak merompak kerana stesyen minyak tersebut tidak diapa-apakan. Maka apa perlunya OKT dan OKT2 terus memukul si mati yang sedang tidur tanpa apa-apa sebab? Apakah yang hendak dirompak dari si mati yang hanya merupakan seorang atendan pam minyak? Apa perlunya si mati dicolek dan dibawa ke ladang kelapa sawit tersebut? Circumstantial evidence menunjukkan si mati telah berjaya ditangkap semula oleh OKT dan OKT2. Si mati tidak dibawa kembali tetapi telah disesah dengan parang berkali-kali dan kemudiannya ditinggalkan di situ, di tempat yang sunyi dan di malam yang gelap gelita. Maka apa perlunya si mati disesah begitu dan kemudiannya ditinggalkan begitu sahaja dengan kaki dan tangannya diikat? OKT dan OKT2 semestinya tahu bahawa perbuatan mereka itu boleh mendatangkan kematian kepada si mati. Akhirnya si mati mati akibat kecederaan yang dialami.

G [16] Passing sentence according to law is the sole prerogative of the court. It must be in accordance with established judicial principles (*Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, at p 316). We are of the view that deterrence assumes an important role in stamping out senseless killing of an innocent victim like the deceased. Indeed the sentence meted out is not only to deter the appellants but also to dissuade others in the future from committing offences of a similar nature (*Yau Kong Kui v Public Prosecutor* [1989] 2 MLJ 139, at p 141; and *Public Prosecutor v Md Rashid bin Harun* [2000] 3 MLJ 503; [2000] 3 CLJ 832).

I [17] Of course, the main aim of imposing a deterrent sentence is to protect public interest (*Public Prosecutor v Loo Chang Hock* [1988] 1 MLJ 316, at p 318). The guardians of public interest are the courts (*Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 at p 84 (FC)). And public interest is always the first and foremost consideration in sentencing (*Public Prosecutor v Ismail bin Loyok* [1958] 24 MLJ 223, at p 224; and *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186 at p 187).

[18] It is our judgment that pleading guilty to the amended charge at first opportunity should not entitle the appellants to any discount. This is the worst case imaginable. This court must make it clear that crime does not pay and the only way for this court to send this message across is by imposing a severe deterrent sentence. This court speaking through Gopal Sri Ram JCA (later FCJ) in *Kesavan all Baskaran v Public Prosecutor* [2008] 6 MLJ 384; [2008] 6 CLJ 390, at p 390 (MLJ) at p 397(CLJ), had this to say:

Having regard to the way which the crime was planned and the most cruel and brutal fashion it was executed the appellant's plea of guilt in our judgment ought to be given no weight. In short, on the peculiar facts of this case it does not operate as a mitigating factor.

[19] Nik Hashim JCA (later FCJ) in *Yit Kean Hong v Public Prosecutor* [2005] 4 CLJ 592, at p 599, aptly said:

A plea of guilt is a mitigating factor (see *Zaidon Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441). It is an accepted rule of practice that an accused should be given credit or discount for pleading guilty (see *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45). The extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence (see *Mohamad Abdullah Ang Swee Keng v Public Prosecutor* [1988] 1 MLJ 167). But it is not a strict rule as the court may refuse to grant any discount in cases where public interest demands a deterrent sentence (see *Zaidon*).

[20] Abdul Wahab Patil J (now JCA) in *Public Prosecutor v Soh Soo Yang & Anor* [2001] 5 MLJ 356, at p 367, rightly held that if the public including the victims and their dependents do not feel that justice is done according to the gravity of the crime, then respect for and reliance upon the law will be eroded.

[21] By way of an amendment to s 304(a) of the Penal Code vide Act A1210, the term of imprisonment was increased from 20 years to 30 years with effect from 6 March 2007. The offence here was committed on 23 December 2003, and the learned High Court judge was correct when he preferred to impose on each appellant a term of imprisonment of 20 years with effect from 21 January 2004 without imposing a fine as well. His Lordship has been magnanimous. In our judgment, the public interest consideration is evidenced by such an amendment which enhances the punishment for an offence under s 304(a) of the Penal Code.

[22] Be that as it may, we took into account the mitigation of each appellant before we passed the appropriate sentence. Haridas a/l Subramaniam (the first appellant) asked for a lighter sentence. A first offender with an aged mother. Age 29. Has been detained for quite some time. Asked for the sentence to be reduced.

- A [23] The second appellant also prayed for a light sentence. He said that his father had passed away about three years ago and that he has been detained in prison for the last four months. He said that he has repented and craved for a lighter sentence.
- B [24] In fixing the appropriate sentence, we took into consideration the following factors:
- C (a) the nature of the offence;
- (b) the prevalence of the offence;
- (c) the difficulty of detection; and
- (d) the sordid circumstances in which the offence was committed.
- D [25] The court has the discretion to be lenient and merciful provided there are extenuating circumstances. Here, there are no extenuating circumstances to be considered in favour of both the appellants. It is in the public interest that the sentence should reflect the gravity of the offence. We cannot be lenient to both the appellants as it would encourage them to commit the same crime in the near future.
- E [26] For the varied reasons alluded to above, we unanimously dismissed the appeals by both the appellants. The sentences imposed on each of the appellants by the High Court are hereby affirmed. The sentences are to run with effect from 21 February 2004.
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Appeals dismissed.

Reported by Kohila Nesan

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